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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 785

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners,

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENTS IN OPPOSITION

CITATIONS AND OPINIONS BELOW

We think it proper for clarification of the record to point out that the opinion set out in Appendix A to the petition is not the opinion of the trial court with respect to the order involved in this case. It is the opinion of the Honorable L. N. Turrentine rendered on May 18, 1954, with respect to an application for an

injunction *pendente lite*. The oral opinion of Judge Hewicker ordering the judgment appealed from is unreported but may be found in the record in the Superior Court Reporter's Transcript, page 372 to page 389.

QUESTIONS PRESENTED

The respondents disagree with the petitioners' statement of questions presented.

Respondents believe that only two questions are properly presented by the petition and the record. Somewhat restated in what we believe to be the interest of precision, they are as follows:

1. May a state court enjoin coercive activity constituting an unfair labor practice carried on against an employer whose business affects commerce when the National Labor Relations Board has refused to exercise jursidiction over the case on the ground that the purposes of the National Labor Relations Act would not be effectuated by its intervention?

2. If the answer to Question 1 is in the affirmative, does a refusal by the Board's Regional Director, pursuant to authority lawfully delegated to him by the Board, to exercise jurisdiction in the particular case in connection with representation proceedings therein, which refusal has become final, constitute such a refusal by the Board, where it would clearly have been futile to appeal to the Board or to file an unfair labor practice charge?

Petitioners assert that two other questions are presented. One is petitioners' Question 2 which reads as follows:

> "If the answer to (1) is in the affirmative, may a State Court do so on grounds the picketing though lawful under State Law is an unfair labor practice under the Act."

This question is not present in the case because the trial court did not enjoin the conduct of petitioners on the ground that it was an unfair labor practice under the National Labor Relations Act, nor did the Supreme Court of California hold the conduct lawful or affirm the injunction on the ground that the conduct was an unfair labor practice under that Act.

Petitioners also assert that there is a question presented which they designate as their Question No. 3. It is as follows:

> "If the answers to (1) and (2) are in the affirmative may a State Court do so where the alleged unfair labor practice consists of picketing for a union shop by a union not 'Designated' by the Board when the Board has declined to hold a representation election and the State of California has no procedure for doing so?"

The question is not presented by the record for the reason, among others, that the State Court did not enjoin the union on the ground that it had not been "designated" by the Board, but rather on the ground that it had not been "designated" by the employees. This asserted question, moreover, was not presented to any of the courts below in any form.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS, INVOLVED

Petitioners assert that the statutory provisions involved are the Taft-Hartley Act, 29 U. S. C., Sec. 141 et seq., (61 Stat. 136) but they do not set forth any provisions of this statute. Also involved in petitioners' asserted Question No. 4 are certain of the regula-

tions issued by the National Labor Relations Board, published in 13 F. R. 3090 and 16 F. R. 1934, specifically those contained in Title 29 of the Code of Federal Regulations, Sections 6 and 101.17.

While the decision below does not raise any constitutional questions, the rule contended for by petitioners would raise serious questions under Article I, Section 8 of the United States Constitution, and the Fifth and Tenth Amendments to the Constitution.

Pertinent portions of these Constitutional provisions, statutes, and regulations are set forth in an Appendix.

STATEMENT OF THE CASE

Petitioners' statement of the case needs to be corrected in one important respect, and supplemented in certain other respects.

In their statement of the case, petitioners assert that the trial court enjoined them from carrying on the activities involved "until one or more of the unions had been designated by the Board." There is no citation to the record for this statement. The decree itself simply used the phrase "properly designated." It is not the law that a union can be properly designated only by the National Labor Relations Board. To the contrary, in the terminology of the National Labor Relations Act, it is designated by the employees and the Board does nothing more than "certify the results" of elections. (Title 29 U. S. Code, Sec. 159, Subdivisions (a) and (c).) None of the courts below interpreted the decree to have the meaning now attributed to it by petitioners. The briefs below show no indication that any of the parties did.

The trial court found that the respondents were engaged in the business of selling lumber and other building materials in the

City of Escondido and elsewhere in the County of San Diego, and that in excess of a quarter of a million dollars of such materials originated outside of California. The testimony of respondent William Garmon, the only direct testimony on the subject, was that the business was retail in nature. (Superior Court Reporter's Transcript, pages 25 and 26). He also testified that the total purchases of the business were over half a million dollars, of which about $200,000.00 originated out of state. (Superior Court Reporter's Transcript, p. 27). (As this was the only testimony on the subject the finding of the Trial Court as to the amount originating out of state is apparently an inadvertent error). There appears no other connection with interstate or foreign commerce. The Supreme Court of California noted that in any event no more than $250,000.00 worth of goods came from interstate commerce and that therefore a request for a review of the action of the Regional Director would have been futile in the light of the Board's rulings and statement of policy referred to in the opinion. (Petition for Certiorari, p. 32).

ARGUMENT

I. THE DECISION OF THE COURT BELOW ON THE FIRST ASSERTED QUESTION WAS CORRECT AND RAISES NO SUBSTANTIAL QUESTION FOR THIS COURT.

A. *The decision of the court below follows principles announced by this Court.*

The decision of the Supreme Court of California is in full accord with the principle enunciated by this Court in *Bethlehem*

Steel Co. v. New York Labor Relations Board, 330 U. S. 767, 774, 91 L. ed. 1234, 1246, in which the Court pointed out:

> "However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, [citation], or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distant segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal upervision awaits federal administrative regulation, [citations]. The states are in those cases permitted to use their police power in the interval."

It is true that the Court refrained from expressly applying this to action of the National Labor Relations Board in refusing to exercise jurisdiction in certain types of cases "for budgetary or other reasons." This undoubtedly was the only proper course for the Court to take, as the holding of the case was that the Board had in effect regulated the matter and in a manner contrary to the rule the state board sought to enforce, so that the question of a refusal to act at all was not before the Court. The application of the principle to the present case is, however, plain. The Board has in this case decided that the controversy falls into a "separate or distinct" segment of the matter covered by the federal statute and that it chooses not to apply the federal regulation to that segment.

Petitioners make much of the fact that three dissenters in the Bethlehem Steel case disagreed with the "suggestion" that

this might be the appropriate result. The dissenters, however, took this position in urging an even wider scope to the power of the states, and, moreover, considered only a refusal induced by budgetary reasons. In the present case the National Labor Relations Board declined to act, not for budgetary reasons, or because it is on "short rations," but because it found that the purposes of the National Labor Relations Act would not be effectuated by its intervention. In effect, it found that the impact of the situation on interstate commerce is too small to justify action by the Federal Government. Such a ruling necessarily implies that the interest of the Federal Government is likewise too slight to justify excluding action by the states, and if Congress has by implication authorized the Board to make and act on such a finding it must have authorized the implication inherent in it.

B. *The decision involves no problem of conflict with any federal statute.*

The decision of the Supreme Court of California in the present case was the only one which could have avoided all problems that involve serious constitutional or federal questions. A ruling that would deprive the states of power to act in a case in which the federal interest was too slight to justify federal action would involve a drastic and needless limitation on the power of the state and such great injustice to those affected that the intervention of this Court might perhaps be necessary. The contrary ruling avoids this problem, and raises no other calling for the intervention of this Court.

Clearly, it is not necessary for this Court to intervene in order to carry out any intention of Congress. It would obviously be

monstrous to hold that there is an area of law in which no party is entitled to relief even for conduct which is admittedly unlawful by the federal law, and, as the Supreme Court of California held, it cannot reasonably be thought that Congress intended any such unreasonable result.

Indeed, if Congress had expressly provided that there should be such an area of anarchy, there would be, to say the least, a serious question whether the power to enact such legislation is conferred by the Constitution. Such power is not conferred by the express terms of the Commerce Clause itself, for respondents are not engaged in interstate or foreign commerce, nor would it be authorized by implication or by the last clause of Article 1, Section 8, of the Constitution, for such legislation would not be "necessary and proper" to protect interstate commerce or to carry into execution any power conferred by the Constitution. (As to the power of Congress see the statement in *Bethlehem Steel Co.* v. *New York Labor Relations Board, supra,* at 330 U. S. 772, 91 L. ed. 1245.) If such power is not conferred by the Constitution it of course is withheld under the Tenth Amendment. In addition, such legislation, had it been passed, might well contravene the due process clause of the Fifth Amendment to the Constitution. All of these problems are avoided by the decision of the California Supreme Court to the effect that Congress did not intend to and did not enact any legislation requiring any such result.

Any possible conflict with any rights created by the National Labor Relations Act is eliminated by the fact that the conduct enjoined is, according to the holding of the court below and the contention of petitioners, positively forbidden by the national law. Thus the problem inherent in several cases, notably *Amal-*

gamated Association v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 95 L. ed. 364, relied upon by petitioners, is not present in the case.

Moreover, Congress could not have intended by forbidding conduct because of its injurious nature to have immunized it in cases in which the Federal interest was slight.

Petitioners also assert that the decision below is contrary to the intent of the provision of Section 10(a) of the National Labor Relations Act which gives authority to the Board to cede jurisdiction over certain industries to local state boards. This authority was by its plain terms given to permit the Board to cede jurisdiction over entire industries in particular states. As appears, for example, from the very instance which gave rise to it (See *Bethlehem Steel Co.* v. *New York Labor Relations Board*, *supra*), it applies to cases in which the Board would otherwise exercise jurisdiction. Obviously, this type of cession involves entirely different considerations from those applicable to cases in which the Board would in any event decline or has in fact declined to exercise its jurisdiction because of a determination that the impact of the situation on interstate commerce was not sufficient to justify its action. Restrictions properly applicable to the one situation cannot be supposed to have been intended by Congress to apply to the other.

There is no possible way in which the decision below can contravene any actual or supposed policy or intent of Congress.

C. *The decision involves no problem of conflict of jurisdiction.*

As the Supreme Court of California pointed out, the result

called for by petitioners is not necessary to protect the jurisdiction of the federal agencies. After the National Labor Relations Board has actually refused to entertain jurisdiction, there can be no question of a conflict between the law enforcement agencies of the state and those of the Federal Government.

D. *The decision presents no question of uncertainty in the law.*

Petitioners suggest that the state courts should be denied the power to act because otherwise there will be uncertainty in the law. This is so obviously incorrect that it does not present a substantial question. The decision below avoids, rather than creates, uncertainty.

It is often exceedingly difficult to ascertain whether a business "affects" interstate commerce, and the federal courts have been saved much labor and worry on this subject by the fact that the National Labor Relations Board has declined to act in many marginal cases. The National Labor Relations Board has now laid down very clear-cut and definite standards as to what cases it will accept jurisdiction over. An actual order of the Board or its duly authorized agencies declining jurisdiction in the particular case is even more definite and easily ascertainable. It follows that a holding in accordance with the contentions of the petitioners would result not only in a most unjust and unreasonable result but would in addition create enormous uncertainty in the determination of the jurisdiction of courts over particular sets of facts. Such uncertainty as to a question of jurisdiction, of such a nature that it could be ultimately resolved only by this Court, would be of the most vicious kind. All this is avoided by the decision of

the Supreme Court of California in this case.

II. THE SECOND QUESTION ASSERTED BY PETITIONERS IS NOT PRESENT IN THE CASE.

The state courts did not enjoin the coercive activities of the petitioners on the ground that though lawful under state law they were an unfair labor practice under the National Labor Relations Act. To the contrary, it appears from the opinion below that similar conduct was held unlawful in California in *Park & Tilford Import Corp.* v. *International Brotherhood of Teamsters,* 27 Cal. 2d 599, 165 Pac. 2d 891, which was decided at a time when no conduct of a union was stigmatized by the National Labor Relations Act as an unfair labor practice.

The court below followed the Park & Tilford case and *James* v. *Marinship,* 25 Cal. 2d 721, 155 Pac 2d 329, and did not purport to base its decision on the fact that the conduct enjoined was an unfair labor practice. Respondents at all stages of the proceedings contended that the conduct was not an unfair labor practice.* The court below, though stating that it was one, cited that fact, at most, as negating a privilege, and rested its decision on common-law principles.

The asserted fact that the conduct was an unfair labor prac-

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*The Brief of Respondents before the District Court of Appeal refers (page 12) to the briefs in two other cases in the same court in which this position was specifically taken. Our brief filed in the Supreme Court of California entitled "Answer to Memorandum of Appellants after Oral Argument" (apparently omitted from the record filed by petitioners) takes the same position. (pages 5 to 9.)

tice serves to emphasize the monstrosity that would be achieved by holding that the state court had no power to act. Congress cannot have intended to create a situation where no law can be enforced because two laws are being violated.

Even if the state court had acted on the ground that the picketing, though lawful under the state law was an unfair labor practice under the Act, still no substantial federal question would be presented. If the court had chosen to take this position, it would have been saying that as applied to such cases it would model its law upon the federal law. This raises no federal question but to the contrary eliminates any conceivable conflict with the policy of Congress. It has never been held that a state may not, if it chooses, model its law as applied to a particular situation upon the federal law, nor has it been held that it may not do this by judicial decision rather than by statute.

III. THE THIRD ASSERTED QUESTION IS NOT PRESENT IN THE CASE.

The record is devoid of any showing that the conduct enjoined consisted of picketing for a union shop by a union not "designated" by the National Labor Relations Board. The facts in this regard have already been stated. For this reason there is no need to consider further petitioners' asserted Question No. 3.

IV. THE PETITIONERS' ASSERTED QUESTION NO. 4 RAISES NO SUBSTANTIAL QUESTION FOR THIS COURT.

The petitioners' asserted Question No. 4 relates to whether the refusal of the Board's Regional Director to institute represen-

tation proceedings constitutes a refusal by the Board to act. We submit that it does, for the reasons stated in the opinion of the Supreme Court of California. It is not questioned that the action of the Regional Director became final when not appealed from, and that it constituted a final disposition of the case by or under the authority of the Board, to the same extent that a final decision by the full Board would have. The regulations set out in the Appendix leave no room for doubt on these points. Moreover, we submit that this question is not of sufficient importance to justify the intervention of this Court. If the Board, through its authorized agencies, has in fact refused to act, its jurisdiction needs no protection.

V. THE QUESTIONS ASSERTED BY PETITIONERS HAVE NOT GIVEN RISE TO A NOTEWORTHY AMOUNT OF LITIGATION OR DISCUSSION.

Petitioners have asserted that the decision below conflicts with certain prior decisions and raises points that have given much trouble to courts and writers. This is not correct.

It is apparent from petitioners' own analysis, contained in Exhibit E to the petition, that very few of the cases said by them to pass upon the point disagree with the decision below. Moreover, not one of the decisions said by petitioners to support their position is that of an appellate tribunal of a state of the United States and only one is the decision of a United States Court of Appeals. That one is *Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 Fed. 2d. 659. Even in that case, the question was not squarely presented nor squarely decided. According to the opinion of the court the principal question presented to it was that of

res judicata and it decided the case upon the basis of that doctrine. The statement quoted by petitioners from the opinion is apparently an afterthought, not fully presented or fully considered, and appears to be no more than a dictum.

Some of the other authorities said by petitioners to contain relevant discussion are not available to us, being trial court decisions or decisions of state labor relations board whose full reports we do not have. It would serve no useful purpose here to analyze in detail those that are. It may be said that for the most part the cases cited involve various aspects of the decision of this Court in *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U. S. 485, 98 L. ed. 228, 74 S. Ct. 161, but neither involve in their factual situations nor contain any discussion in their opinions of any of the four questions which petitioners assert are involved in this case. Of those few that do refer to a question raised in this case, most merely refer to them only in passing.

Likewise, of the text authorities cited, so far as they are available to us, virtually none advert to or discuss any of these questions.

Therefore, contrary to the impression sought to be given in the petition, the problems in the present case are ones which have given rise to comparatively little litigation (and almost no decisions in favor of petitioners) and have received small notice in the very extensive literature on the general subject of the problems inherent in the Garner case.

CONCLUSION

Much of the discussion in the petition is based upon the assumption that the conduct enjoined in the present case was enjoined because the National Labor Relations Board had not "designated" the union as the bargaining agent of the employees. When this misapprehension is cleared away we remain with little more than the bare contention that Congress intended such conduct, though too injurious to be permitted when large employers are involved, to be completely immunized from restraint in cases that do, indeed, affect interstate commerce, but not very much. Such a result would create a special class of cases, treated differently both from those over which the Board accepts jurisdiction and from those over which it has none and would deprive employers of moderate size and their employees of a protection found by Congress to be necessary for large ones. It would create a most serious and unjust lack of uniformity with any other law, and one which cannot be supported as being in accord with any legislative or public policy.

Congress by making conduct an unfair labor practice meant to prevent it, not to immunize it from restriction.

The decision of the Supreme Court of California was plainly correct for the reasons stated in the opinion, and does not raise any problems calling for the intervention of this Court. The petition should be denied.

Respectfully submitted,
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APPENDIX

CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I, Section 8

The Congress shall have Power . . .

. . . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . . . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

AMENDMENTS TO THE CONSTITUTION

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTES

National Labor Relations Act, Section 10 (Title 29 U. S. Code, Section 160)

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

National Labor Relations Act, Section 9 (Title 29 U. S. Code, Section 159)

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a

unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

. . . . .

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

. . . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

. . . . .

REGULATIONS

Title 29 United States Code of Federal Regulations, Section 6

Under the general supervision and direction of the General Counsel the Regional Directors have the following authority:

. . . . . .

. . . . .

(c) To decline to issue a complaint or a Notice of Hearing, subject to the right of the aggrieved party, in the case of a complaint, to appeal to the General Counsel, and in the case of a

Notice of Hearing in a representation case, to appeal to the Board. . . . .

Title 29 United States Code of Federal Regulations, Section 101.17

(a) Upon receipt of the petition in the Regional Office, it is docketed and assigned to a member of the staff, usually a Field Examiner, for investigation. He conducts an investigation to ascertain . . . (3) whether the election would effectuate the policies of the Act and reflect the free choice of employees in the appropriate unit, . . .

. . . . .

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of representation exists within the meaning of the statute, because, among other possible reasons, the unit is not appropriate, or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification, the showing of representation among the employees is insufficient to warrant an election under the 30 percent principle stated in paragraph (a) of this Section. .

(c) For the same or similar reasons the Regional Director may request the petitioner to withdraw its petition. If, despite the Regional Director's recommendation, the petitioner refuses to withdraw the petition, the Regional Director then dismisses the petition stating the grounds for his dismissal and informing the petitioner of his right of appeal to the Board in Washington, D. C. The petitioner may within 10 days appeal from the Regional Director's dismissal by filing such request with the Board in Washington. After a full review of the file with the assistance

of its staff, the Board may sustain the dismissal, stating the ground of its affirmance, or may direct the Regional Director to take further action.